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90-1851

No. _____

Supreme Court, U.S.
FILED
FEB 27 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

JOHN JUDICE AND AUDREY JUDICE,

Petitioners,

versus

SAM PARICH, WESLEY PARICH, AIMEE V. PARICH, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals, sitting as an *Erie* Court, err when it blatantly refused to follow Louisiana case law affirmed by the state's highest court, Louisiana statutory law, and the position of the Louisiana parties, as to the value of an assignment of litigious rights when the error creates an unreasonable and impermissible result?

LIST OF ALL PARTIES

The following is a list of all parties to these proceedings:

(1) Petitioners John Judice and Audrey Judice intervened in the district court proceedings

(2) Sam Parich, Wesley Parich, and Aimee V. Parich were plaintiffs in the district court proceedings

(3) State Farm Mutual Automobile Insurance Company was the defendant in the district court proceedings

(4) Carolyn Ingraham Dietzen, Counsel for Petitioners John Judice and Audrey Judice

(5) Edmond L. Guidry, III, Counsel for Respondents Sam Parich, Wesley Parich, and Aimee V. Parich

(6) Howard W. Martin, Counsel for Respondent State Farm Mutual Automobile Insurance Company

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JOHN JUDICE AND AUDREY JUDICE,

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SAM PARICH, WESLEY PARICH, AIMEE V. PARICH, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, John Judice and Audrey Judice, respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OFFICIAL REPORTS OF OPINIONS

1. The Judgment of the United States Court of Appeals, Fifth Circuit, dated December 6, 1990, denying the Petitions for Rehearing is unpublished and is reprinted in the Appendix at pages 1-2.

2. The Decision of United States Court of Appeals, Fifth Circuit, dated October 19, 1990, is unpublished and is reprinted in the Appendix at pages 3-33.

3. The Judgment of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, dated July 17, 1989, is unpublished and is reprinted in the Appendix at pages 34-36.

4. The Ruling of the United States District Court for the Western District of Louisiana, Monroe Division, dated June 27, 1989, is unpublished and is reprinted in the Appendix at pages 37-46.

5. Ruling United States District Court for the Western District of Louisiana, Lafayette Division April 12, 1989 is unpublished and reprinted in the Appendix at page 47-63.

STATEMENT OF JURISDICTION

The date of the entry of the judgment sought to be reviewed is October 19, 1990. The date of the order denying the Petition for Rehearing is December 6, 1990. Jurisdiction of this court is conferred by 28 U.S.C. §1254.

The Louisiana Civil Code Articles involved in the case are as follows:

Art. 2652. Sale of litigious rights

He against whom a litigious right has been transferred, may get himself released by paying to the transferree the real price of the transfer, together with the interest from its date.

Art. 2654. Exceptions to application of Article 2652

The provisions of article 2652 do not apply:

1. When the transfer has been made either to a coheir or to the coproprietor of the right.

2. When such right has been transferred to a creditor as a payment for a debt due to him.

3. When the transfer has been made to the possessor of the estate subject to the litigious right.

STATEMENT OF THE CASE

In the District Court, the respondents, Sam Parich, Wesley Parich, and Aimee V. Parich (hereinafter referred to as the "Pariches"), insureds of State Farm Mutual Automobile Insurance Company (hereinafter referred to as "State Farm"), sought damages from State Farm for its bad faith or arbitrary and capricious refusal to inform the Pariches of an offer made by John Judice and Audrey Judice (hereinafter referred to as the "Judices") to settle a personal injury lawsuit prior to its trial. The Judices' settlement offer was for the remaining $24,000.00 limits of the State Farm automobile insurance policy plus the accrued prejudgment interest and all money the Pariches

could afford to pay. The Pariches had previously offered to pay $12,000.00 above the State Farm policy limits. As a result of State Farm's refusal to inform the Pariches of the settlement offer and State Farm's refusal to accept it, the personal injury suit was tried and resulted in a judgment in favor of the Judices and against the Pariches in an amount far exceeding the Pariches' policy limits.

After the rendition of the personal injury judgment, the Pariches and the Judices, through their attorneys, entered into discussions and exchanged correspondence relative to pursuing a bad faith action against State Farm. The Pariches made a partial payment on the personal injury judgment of $15,000.00 to the Judices attorney. Several months later the Pariches signed a purported assignment of litigious rights at their attorney's office.

The Pariches filed suit on January 26, 1987 against State Farm in the Sixteenth Judicial District Court for the Parish of Iberia, State of Louisiana. State Farm removed the case to the United States District Court, Western District of Louisiana, Lafayette-Opelousas Division. Jurisdiction was based on diversity of citizenship, 28 U.S.C. §1332. On April 11, 1989, the morning of trial, the trial judge allowed the Judices to intervene to recover the sums remaining due on their personal injury judgment.

The Honorable Donald Walter, a federal judge well-schooled in Louisiana law and practice, sitting as an *Erie* court, tried the case on April 11 and 12, 1989. After the conclusion of the presentation of evidence on April 12, 1989, Judge Walter orally gave his findings of fact and partial conclusions of law. He found that the actions of State Farm constituted negligence. He requested post-trial memorandum on (1) whether a valid out-of-court

compromise was reached by the Pariches and Judices, and (2) whether or not an award of penalties and attorneys fees was due the Pariches pursuant to Louisiana statutes. Judge Walter rendered his Ruling on June 27, 1989. The Ruling addressed issues involving only Louisiana law. The trial court found that contrary to the argument of State Farm, the Pariches and the Judices had not entered into a valid compromise agreement and that the Pariches were not entitled to penalties and attorneys fees. He signed the Judgment on July 17, 1989. The Judgment was in favor of the Pariches and against State Farm in the full amount of the personal injury judgment the Judices had obtained against them as a result of the negligence of State Farm, namely, Three Hundred Fifty-Five Thousand Seven Hundred and No/100 ($355,700.00) Dollars, together with legal interest from March 24, 1983, until paid, less Fifteen Thousand and No/100 ($15,000.00) Dollars, plus court costs. The Judgment allowed the Judices, as intervenors, to recover from the Pariches the full amount of the personal injury judgment.

A panel of the Fifth Circuit, consisting of three Texas judges, reversed and remanded the decision of the Louisiana federal judge. The panel agreed with the District Court that State Farm's failure to inform the Pariches of a settlement offer and the reason it was rejected was negligent. Contrary to the finding of the Louisiana federal judge and the position of the Louisiana parties, the panel found that the Judices and the Pariches entered into a compromise agreement to settle the Judices' claim against the Pariches. Also, contrary to the finding of the Louisiana federal judge and the position of the Louisiana parties, the panel ruled that the value of the compromise

agreement was not the full amount of the personal injury judgment, namely Three Hundred Fifty-Five Thousand Seven Hundred and No/100 ($355,700.00) Dollars, plus legal interest from March 24, 1983 until paid, less Fifteen Thousand and No/100 ($15,000.00) Dollars, plus court costs, but rather was Three Thousand and No/100 ($3,000.00) Dollars. The Three Thousand and No/100 ($3,000.00) Dollars represents the difference between the Twelve Thousand and No/100 ($12,000.00) Dollars that the Pariches had offered to pay the Judices prior to the trial of the personal injury suit and the Fifteen Thousand and No/100 ($15,000.00) Dollars actually paid by the Pariches after the trial of the personal injury suit as partial satisfaction of the personal injury judgment.

This Petition for Writ of Certiorari should be granted and the opinion summarily reversed for the following reasons:

1. The decision of the Fifth Circuit is in conflict with Louisiana case law affirmed by the state's highest court and Louisiana statutory law and thus errodes the *Erie* doctrine.

2. The opinion may result in a gross miscarriage of justice for the Judices in that they may be unable to collect the total amount of the personal injury judgment plus interest which now exceeds $700,000.00.

3. The opinion promotes forum shopping by non-Louisiana citizens between federal and state courts as they attempt to circumvent Louisiana contract law.

ARGUMENT

1. DID THE FIFTH CIRCUIT COURT OF APPEALS, SITTING AS AN *ERIE* COURT, ERR WHEN IT BLATANTLY REFUSED TO FOLLOW LOUISIANA CASE LAW AFFIRMED BY THE STATE'S HIGHEST COURT, LOUISIANA STATUTORY LAW, AND THE POSITION OF THE LOUISIANA PARTIES, AS TO THE VALUE OF AN ASSIGNMENT OF LITIGIOUS RIGHTS WHEN THE ERROR CREATES AN UNREASONABLE AND IMPERMISSIBLE RESULT?

As a result of the decision in *Erie Railway Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938) in an action where jurisdiction is based upon diversity of citizenship, a federal court must apply state law. In accordance with Louisiana law, the Trial Court placed the value of the Pariches' rights against State Farm as the full amount of the excess judgment for which they had been cast. The Court of Appeals, by its reversal of that decision, reached a legal conclusion that is contrary to established Louisiana law when it valued the Pariches' rights as the amount of money they actually paid to the Judices as partial satisfaction of the judgment. The Judices respectfully direct this Court's attention to two areas of Louisiana law, namely, the jurisprudence which has addressed the value of a claim for bad faith refusal to settle a lawsuit and the Civil Code Articles addressing the sale of litigious rights and the jurisprudence interpreting those articles.

A. THE JURISPRUDENCE INTERPRETING THE VALUE OF AN INSURER'S NEGLIGENT REFUSAL TO SETTLE CLAIM.

The most recent decision addressing the issue of whether the value of the rights of an insured against an

insurer is the pecuniary amount the insured-judgment debtor paid its judgment-creditor, rather than the actual amount of the excess judgment for which the insured was cast is *Great Southwest Fire Insurance Company v. CNA Insurance Companies, et al*, 547 So. 2d 1339 (La. App. 3rd Cir. 1989), *affirmed* 557 So. 2d 966 (La. 1990). In that case, the Louisiana Third Circuit Court of Appeal clearly and unequivocally stated that the real value of an insured's rights against an insurer for bad faith failure to settle is the amount of the excess judgment. The Louisiana Supreme Court affirmed the Third Circuit decision. The Supreme Court did not directly address the valuation question, but inherent in its opinion is the underlying assumption that the value is the dollar amount for which the judgment debtor is cast.

The Louisiana Third Circuit in its decision initially addressed the issue of value in its discussion of an insurer's duty to settle. Quoting *Hodge v. American Fidelity Fire Insurance Co.*, 486 So. 2d 233, 236 (La. App. 3rd Cir., 1986), *writ denied*, 489 So.2d 917 (La. 1986), the court noted,

> "However the insurer may be liable to its insured for the judgment in excess of policy limits for which the insured is cast where the insurer's failure to accept the settlement offer is not in good faith or is arbitrary and capricious". *Southwest*, supra at 1346.

In Southwest, an excess insurer had paid off the excess judgment for the insured and then prosecuted an action against the primary insurer based on the insured's rights. The primary insurer in *Southwest* argued, as State Farm will undoubtedly argue before this court, that the

insured's rights encompass only those pecuniary damages actually suffered.

The Louisiana Third Circuit soundly rejected that contention and found that the value of the insured rights against the insurer is the amount of the excess judgment, *not* the actual expenses or damages incurred.

In *Southwest*, the Court expressly rejected the primary insurer's contention that the excess insurer had no cause of action for the value of the excess judgment because the excess insurer had paid the excess judgment and there were no rights the insured could transfer to the excess insurer by subrogation. The Court explained:

> "Under the 'collateral source' rule our courts permit recovery of damages incurred by a plaintiff where he will never have to pay since they have been paid from another source." (Citations omitted)
>
> • • •
>
> "A plaintiff in a personal injury action has never been required to show that he is able to pay expenses incurred in order to recover them." (Citations omitted)
>
> • • •
>
> "A cause of action for bad faith failure to settle is not dependant upon the *insured's prior payment* or the certainty of his future payment of the judgment against him." (Citations omitted). *Great Southwest Fire Insurance Company v. CNA Insurance Companies, et al*, supra, 547 So.2d at 1347, 1348.

Thus, following the Court's rationale, the value of the bad faith refusal to settle claim is the amount of the excess judgment in at least the following three situations:

> 1. Where an insured has paid any amount to the judgment creditor and obtained a release.
>
> 2. If some other person gratuitously or otherwise obtains discharge for the insured, the insured retains his rights against the insurer.
>
> 3. If one could never pay off the judgment the insured retains his rights against insurer.

The Louisiana Third Circuit Court of Appeal in *Southwest* further explained that such claims can be pursued by judgment creditors whether the judgment creditor receives its rights by assignment or seizure. *Southwest*, supra, 547 So.2d at 1348. See also, *Wooten v. Central Mutual Insurance Company*, 166 So.2d 747, (La. App. 3rd Cir. 1964), where the claim was pursued by a bankruptcy trustee.

The Fifth Circuit Court of Appeals found that the Pariches had validly assigned their rights to pursue State Farm to the Judices. Although the Judices and the Pariches dispute that finding, if for the purposes of this argument, it is assumed to be correct, then the Fifth Circuit decision on value is clearly erroneous under Louisiana law.

In *Southwest*, the Third Circuit Court of Appeal specifically identified the situation where litigious rights were transferred by assignment and explained:

> "Defendants without excess coverage, who were cast for an excess judgment, have *assigned* their rights for a bad faith claim for damages against their primary insurer to their judgment creditors, in *settlement* of the excess judgment, and the judgment creditors, as assignees, have been permitted to assert the claims."

Southwest, supra, 547 So.2d at 1348. (emphasis added) As this Court can see, the settlement of the excess judgment and the assignment of the rights to pursue the bad faith refusal to settle claim does not alter the value of the claim.

This Court should note that in *Southwest*, the excess insurer "discharged" the debt and nonetheless stood in the place of the insured to assert all of the insured's claims against the primary insurer. The court held that the excess insurer had no less rights than the judgment-creditor-assignee. *Southwest*, supra, 547 So.2d at 1348.

The Louisiana Supreme Court in *Southwest* found that since the excess insurer's petition alleged both legal and conventional subrogation to the insured's claim, it stated a cause of action. The court's decision allowed the excess insurer, as a creditor, to assert the value of the excess judgment as damages. *Southwest*, supra, 557 So.2d at 969.

The *Southwest* decision is supported by clear and settled Louisiana jurisprudence. Louisiana courts mandate that the value of the right of the insured against his insurer for bad-faith failure to settle within policy limit is " . . . the *judgment* in excess of policy limits for which the insured is cast . . . " *Hodge v. American Fidelity Fire Insurance Co.*, supra, 486 So.2d at 236.

In addition to the amount of the excess judgments, Louisiana courts also allow recovery of other pecuniary damages. When an insured was forced to hire another attorney to protect his interest as a result of the insurer's bad faith failure to defend and settle, the court found the insured was entitled to both compensatory damages, actual costs incurred i.e. attorney fees, interest and costs,

and the amount of judgment in excess of the policy. *Domangue v. Henry*, 394 So.2d 638, 639 (La. App. 1st Cir. 1988), *writ denied* 399 So.2d 602.

None of the cases cited by the panel of the Fifth Circuit support its position that the value of an assignment of litigious rights is limited to the amount the insured judgment debtor actually paid the judgment creditor. All of the cases cite settled Louisiana law that an excess insurer may be liable for an excess judgment against its insureds if the insurer was arbitrary or in bad faith in refusing to settle claims within policy limits. The cases cited by the Fifth Circuit appear in its decision on pages 31 and 32 of the attached appendix. These cases are as follows: *Roberie v. Southern Farm Bureau Casualty Insurance Company*, 250 La. 105, 194 So.2d 713 (1967); *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 411 So.2d 564, 566 (La. App. 1st Cir. 1982); *Cousins v. State Farm Mutual Automobile Insurance Company*, 294 So.2d 272 (La. App. 1st Cir. 1974), *cert. denied*, 296 So.2d 837 (La. 1974); *Ward v. State Farm Mutual Automobile Insurance Company*, 539 F.2d 1044, 1049 (5th Cir. 1976); *Bohn v. Sentry Insurance Company*, 681 F.Supp. 357, 363 (E.D. La. 1988).

In *Roberie*, the insured, Roberie, filed suit against his insurer to recover Seven Thousand ($7,000.00) Dollars, the amount he had paid to his judgment creditor to settle an excess judgment. Unlike the present case, *Roberie* did not involve an assignment by Roberie of his litigious rights to his judgment creditor to pursue Roberie's claim against his insurer. Roberie pursued the claim himself and asked the court to allow him to recover the seven thousand dollars he actually paid the judgment creditor to settle the claim. The court allowed him to recover that

amount. He had not asked to recover the full amount of the excess judgment. *Roberie* differs from the present case where the Pariches asked and obtained the full amount of the excess judgment from the trial court.

In *Hodges*, the insureds, the Hodges, sought to recover the sum of Forty Thousand ($40,000.00) Dollars which represented the full amount of the excess judgment for which they were cast. The Hodges had not assigned their rights to their judgment creditors, but their judgment creditors may have intervened since the trial court, after ruling in favor of the Hodges and against their insurer, ordered the award to be placed into the registry of the court for satisfaction of the judgment of their judgment creditors. In *Hodges*, the trial court and the Louisiana Third Circuit Court of Appeal allowed the Hodges to recover the full amount of the excess judgment, plus legal interest, court costs, and attorney's fees from their insurer.

The *Cousins* decision restates longstanding Louisiana law that:

> (1) An insurer is bound to provide its insured with a competent defense and "is liable to the insured for any damages sustained as a result of the breach of that obligation".
>
> (2) While an insurer is not required to settle a claim within its policy limits, it "may be liable for an excess judgment against the insured where the insurer's refusal to settle within policy limits is found to be arbitrary or in bad faith". *Cousins*, supra, 294 So.2d at 275.

The Cousins, the insureds, filed suit against State Farm to recover the amount of the excess judgment for

which they were cast. Their judgment creditors intervened. The trial court found in favor of the Cousins, but the Third Circuit reversed, finding that State Farm had kept the Cousins advised of the possibility of an excess judgment and that the Cousins had not wanted to settle the personal injury action because they believed they were judgment proof. Nowhere in the opinion is there language that says that the intervenor's right to recover is limited to the amount the Cousins paid. The rights of the judgment creditor-intervenors are not even discussed.

Again, in *Ward*, a panel of the U.S. Fifth Circuit Court of Appeals allowed the Wards, the insureds, to recover the full amount of the excess judgment, namely $521,375.00, from State Farm as a result of its arbitrary refusal to settle a personal injury suit within policy limits. Nowhere in the opinion is there any language that would limit the Wards' recovery to less than the value of the excess judgment. In fact, in *Ward*, the plaintiffs sought to recover from State Farm their nonpecuniary damages which were incurred above and beyond the amount of the personal injury judgment. The Fifth Circuit could not determine if the additional nonpecuniary damages were recoverable, so it certified the question to the Louisiana Supreme Court. The parties settled the case prior to the Louisiana Supreme Court rendering an opinion on the certified question.

In the *Bohn* case, a Louisiana newspaper argued and the United States District Court found that it was an additional insured under the language of an insurance policy held by one of its employees. The newspaper, by way of a third party claim, asserted that the employee's insurer had acted arbitrarily or in bad faith when it

settled a personal injury claim against the employee without also settling the claim against the newspaper. The court found that the insurance company had not acted arbitrarily or in bad faith and therefore was not liable to the newspaper. Since the court found no liability, the court did not address the issue of damages.

In sum, a review of the cases cited by the Fifth Circuit in support of its decision in the present case, reveals that it cited no authority in support of its decision to deny the Judices, as assignees and intervenors, the right to recover the full amount of the excess judgment from State Farm. Since there was no authority to support its opinion, it should have rendered a decision following Louisiana law. If the court had any question as to the law, it should have certified the question to the Louisiana Supreme Court as was done in *Ward*.

The Fifth Circuit Court of Appeals' decision, contrary to established Louisiana jurisprudence, indicates that the value of an insured's right is dependent on factors such as: when and how much an insured paid on a judgment, whether the judgment was gratuitously or otherwise released, and the point in time the insured entered into an assignment or subrogation agreement. Different values based on these factors makes a judgment creditor uncertain as to how to collect his judgment without losing any of his rights.

To follow the Fifth Circuit Court of Appeals' opinion in this case to its logical conclusion leads to the untenable situation where a judgment creditor must force the debtors into bankruptcy. The bankruptcy trustee having been assigned the debtors' rights, then must pursue the

claim and distribute the proceeds to the creditor. See for example *Wooten v. Central Mutual Insurance Company*, 166 So.2d 747 (La. App. 3rd Cir. 1964), where a bankruptcy trustee pursued a claim for wrongful refusal to settle on behalf of an insured's estate.

As a result of the *Parich* decision, a judgment creditor is now forced to pursue a judgment debtor into bankruptcy, rather than use other less devastating ways to collect the judgment. Petitioners, the Judices, should be in no worse position now than had they forced the Pariches to seek protection by initiating bankruptcy proceedings.

B. THE FIFTH CIRCUIT COURT OF APPEALS' VALUATION OF RIGHTS IS CONTRARY TO LOUISIANA CIVIL CODE ARTICLES ADDRESSING THE SALE OF LITIGIOUS RIGHTS AND THE JURISPRUDENCE INTERPRETING THOSE ARTICLES.

The panel of the Fifth Circuit Court of Appeals found that the Pariches and Judices entered into a compromise agreement prior to the initiation of the district court proceedings. The Judices and the Pariches both disputed this finding before the Fifth Circuit. The Fifth Circuit found that the purported Compromise Agreement entitled the Judices to recover $3,000.00, the difference between $12,000.00, the amount the Pariches offered to pay the Judices prior to the trial of the personal injury suit, and the $15,000.00 the Pariches paid after the jury verdict in the personal injury suit. Petitioners respectfully submit that once this court carefully reviews Louisiana Civil Code Articles 2652, 2654(2) and the interpretive

jurisprudence the court will see that an assignee of litigious rights is entitled, not to value that the insured paid to the judgment creditor, and not the real price that the judgment creditor paid to the insured, but to the actual value of the excess judgment.

Civil Code Article 2652 provides:

> "He against whom a litigious right has been transferred may get himself release by paying to the transferree the real price of the transfer, together with the interest from its date."

An exception to this article is set forth in Civil Code Article 2654(2) which states:

> "The provisions of Article 2652 do not apply:
>
> • • •
>
> 2. When such right has been transferred to a creditor as a payment for a debt due him.
>
> • • •"

The exception found in Louisiana Civil Code Article 2654(2) provides special protection for creditors in particular. See *Early v. Black*, 12 La. 205 (N.O. 1838), citing the precursors of Civil Code Articles 2652 and 2654(2). In that case, the court explained that a judgment-creditor obtaining a litigious right obtains "all the rights and claims" that the debtor had. The one against whom the right was transferred can not obtain satisfaction merely on payment of the sum for which the transferree paid for the right.

The Fifth Circuit Court of Appeals found that the Judices acquired the Pariches' rights against State Farm. Having done so, the Court of Appeals should have

applied Civil Code Article 2654(2) and found that the value of those rights is not the additional $3,000.00 the Pariches paid to the Judices after the trial of the personal injury suit, but the actual amount of the excess judgment against State Farm.

Further, assuming the correctness of the Fifth Circuit Court of Appeals decision that the Judices released the Pariches, which the Judices deny, under Civil Code Article 2652, the Judices should receive the full value of that release, i.e., the value of the excess judgment. After all, the real price paid by the Judices to the Pariches was the amount of the excess judgment.

CONCLUSION

By valuing an insured's rights against an insurer for bad faith failure to settle at a value other than the amount of the excess judgment, the Fifth Circuit Court of Appeals ignored established Louisiana laws.

Neither Louisiana case law nor statutes concerning value support the ruling. Even the case law cited by the Fifth Circuit is contrary to its decision. If the Fifth Circuit had questioned Louisiana law, the proper method would have been to certify the question to the Louisiana Supreme Court rather than create new law.

Assuming for the purposes of this writ application that the Fifth Circuit correctly decided that the Pariches validly assigned their rights to pursue State Farm (a position both parties denied), then that assignment had no real purpose, if the Judices could only pursue State

Farm for a paltry $3,000.00, rather than the full amount of the $355,000.00 plus judgment.

The incidious nature of the decision becomes apparent when one realizes that when the Judices seek to collect the excess judgment from the Pariches, the Pariches will undoubtedly argue that the Fifth Circuit's decision is res judicata and bars the Judices from collecting their judgment. They may prevail on that argument despite the fact that (1) the Pariches argued to the Fifth Circuit that (a) there was no assignment of litigious rights; and (b) if there was an assignment, its value was the amount of the excess judgment; and (2) State Farm, not a party to the assignment and not a third party beneficiary, sought and obtained its enforcement.

Although the decision is unpublished, it will affect litigants other than the parties to this action. When counsel to the Pariches and the Judices are questioned about the case, it is now necessary to advise others similarly situated that the only prudent way to pursue such a claim is to force the insured into bankruptcy and then have the bankruptcy trustee pursue the claim against the insurance company. What could have been accomplished by contract of assignment must now be done by resorting to the bankruptcy court.

This Court should grant a writ of certiorari and summarily reverse the Fifth Circuit in order to resolve a

conflict between the decision of the United States Fifth Circuit Court of Appeals and settled Louisiana law.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4636

SAM PARICH, WESLEY PARICH
and AIME [sic] V. PARICH,

Plaintiffs-Appellees
Cross-Appellants,

versus

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO.

Defendant-Appellant
Cross-Appellee,

JOHN JUDICE and
AUDREY JUDICE,

Intervenors-Cross-Appellees.

Appeals from the United States District Court for the
Western District of Louisiana

ON PETITIONS FOR REHEARING
(December 6, 1990)

Before GARZA, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

CLERKS NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

/s/ E. Grady Selly
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4636

SAM PARICH, WESLEY PARICH
and AIMEE V. PARICH,

Plaintiffs-Appellees
Cross-Appellants,

versus

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO.,

Defendant-Appellant
Cross-Appellee,

and

JOHN JUDICE and
AUDREY JUDICE,

Intervenors-Cross-Appellees.

Appeals from the United States District Court for the
Western District of Louisiana
(CV87-0386-L)

(October 19, 1990)

Before GARZA, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In this diversity case, State Farm appeals a judgment based on a finding that it negligently failed to settle an auto-accident suit against an insured. State Farm soon realized that the victim's medical expenses would exceed the insured's $25,000 policy limits, but could not reach a settlement with the victim. The case went to trial, and the jury rendered a verdict against the insured for almost $400,000. As part of a subsequent compromise agreement, the insured agreed to pay the victim $15,000 and to assign him its right to sue State Farm for negligent failure to settle, in return for release from liability on the judgment. The victim and the insured then sued State Farm.

After a bench trial on the issue of negligent failure to settle, the district court found that State Farm had negligently failed to settle the case and awarded judgment against State Farm. In doing so, however, the district court held the post-judgment settlement between the insured and the victim had not been a valid compromise of their dispute. The insured had thus retained its right of action against State Farm. The district court entered judgment in the insured's name, but ordered it paid to the victim, who intervened in the action. For the reasons set forth below, we reverse.

I

On May 31, 1982, Wesley Parich, son of Sam and Aimee Parich, had an automobile accident involving John Judice in New Iberia, Louisiana. Judice suffered extensive injuries to his legs, hip, and head. State Farm Mutual Automobile Insurance Company had issued a liability policy covering the Parich family and the car Wesley was

driving. The policy provided bodily injury liability limits of $25,000 per person.

On March 24, 1983, the Judices sued the Pariches and State Farm in state court. On April 22, they added the city of New Iberia and its insurance company as defendants. On July 8, Alex Lopresto, the attorney for State Farm, offered to pay the policy limits, $25,000, plus $10,000 from the Pariches to settle the case. Cecilia Bonin, attorney for the Judices, rejected the offer and countered with a request that State Farm unconditionally tender $25,000. State Farm refused.

On September 6, 1984, Bonin offered to settle the case for State Farm's policy limits, costs, and interest plus $25,000 from the Pariches. State Farm counter-offered on September 12, with a proposal to settle for $24,000 (the balance of its policy limits, as $1,000 had already been advanced to the Judices for medical expenses), court costs, and $12,000 from the Pariches. Bonin rejected this counter-offer.

A year-and-a-half later, as trial was approaching, the parties exchanged new offers and counter-offers. On March 13, 1986, Bonin offered to settle with State Farm for $310,000; Lopresto refused. Meanwhile, Bonin was also discussing a settlement with the city of New Iberia. These negotiations were more successful. On the morning of March 21, Bonin and the Judices met with an attorney for the city. State Farm was not represented at this meeting. The Judices agreed to settle their claims against the city for $157,000.

Bonin then immediately telephoned Lopresto and offered to settle the case against State Farm for the balance of its policy limits ($24,000), interest, court costs and $12,000 from the Pariches. This was exactly the offer that State Farm had made in September of 1984, except that it included a request for interest on State Farm's portion of the settlement. Lopresto explained that he would need authority from a State Farm Claim Adjuster to agree to pay interest, and called Clyde Landreth, a Claims Supervisor. Landreth told him that State Farm had a company policy of not paying interest on settlements unless there was a judgment in force.

Lopresto called Bonin back and explained that State Farm would not pay interest. He then stated that because they were so close to a settlement (the interest was then roughly $8,000), he would contact the Pariches to see if they could make up the difference. Bonin indicated this was not acceptable, because the additional money had to come from State Farm, and withdrew her offer. Depending upon the testimony of Bonin, Lopresto or Landreth, this entire round of phone calls occurred within the space of fifteen minutes to two hours. On March 24, Bonin formally withdrew the March 21 offer in a letter to Lopresto, and restated her earlier offer of $310,000. A week later, on April 1, Lopresto offered to settle the case for $24,000 from State Farm with interest, plus $15,000 from the Pariches. Bonin rejected this offer on April 7.

The case was tried April 14-16. The jury assigned ninety percent of the fault to the Pariches and State Farm, and ten percent to the city of New Iberia. State Farm paid its policy limits of $24,000, plus interest, leaving a balance

due from the Pariches of $355,700 together with interest from March 24, 1983.

In early May, the Judices and the Pariches began further negotiations. Everyone realized that the Pariches could not pay the judgment. The parties considered State Farm's potential liability to the Pariches for its handling of the case. On May 7, Lynn DeRouen, attorney for the Pariches, wrote the Judices confirming a telephone conversation in which the Pariches agreed to pay the Judices $15,000, to assign any rights they might have against State Farm to the Judices, and to assist in a suit against State Farm for negligent failure to settle, in exchange for full release from liability. By copy of that letter, DeRouen informed Bonin that the Pariches were willing to assign their rights to the Judices and requested that she draft the necessary documents. On May 12, Bonin wrote DeRouen, acknowledging receipt of his letter and stating that she was preparing the paperwork. On July 17, Sam Parich paid Bonin $15,000 and obtained a receipt.

Attorneys for the Pariches and Judices apparently discussed different ways of substituting the Judices for the Pariches in a suit against State Farm, including a transfer of litigious rights and an intervention by the Judices in a suit filed by the Pariches. Pursuant to these discussions, Edmond L. Guidry, III, attorney for the Pariches in this case, sent DeRouen two documents: a petition for damages against State Farm on behalf of the Pariches and an assignment of the Pariches' rights against State Farm to the Judices. According to Guidry's instructions, the assignment was to be executed in "authentic form" (before a notary and two witnesses) *after* State Farm filed an answer in the proposed suit. Guidry asked

DeRouen to review the petition and assignment with the Pariches, to have them sign the verification on the petition, and to return the original petition for filing.

The assignment provided:

> PERSONALLY CAME AND APPEARED: WESLEY PARICH, . . . and SAM and AMY [sic] V. PARICH, . . . who declared that in consideration of their release from that certain Judgment rendered against them in favor of John Glenn Judice and Audry Judice in the matter entitled "John Glenn Judice and Audry Judice v. Wesley Parich, Amy [sic] Parich, Sam Parich, State Farm Insurance and City of New Iberia," 16th Judicial District Court, Parish of Iberia, State of Louisiana, Civil Action No. 52363, said Judgment having been signed by Judge Edward A. delaHoussaye on April 22, 1986, said assignors have sold, assigned, transferred, set over and delivered and by these presents does, sell, assign, transfer, set over and deliver onto John Glenn Judice and Audry Judice, their successors and assigns, to their own proper use and benefit forever, any and all sum or sums now due or owing said assignor, and all claims, demands and cause or causes of action of whatever kind and nature which said assignor had or now has or may have against State Farm Insurance Company, arising out of State Farm Insurance Company's failure to properly defend and/or settle the claims against them in the aforementioned matter, . . .

It also stipulated that the Pariches would assist the Judices in any action against State Farm. It did not mention the $15,000 payment.

On January 16, 1987, the Pariches executed the assignment. DeRouen himself notarized it, although the

Pariches actually signed the document out of his presence. He then returned the completed assignment and the petition to Guidry. When the assignment was returned, no action had yet been filed against State Farm. Ten days later, on January 26, 1987, the Pariches brought this action in Louisiana state court against State Farm for negligent failure to settle. State Farm removed the case to federal court, and the Judices were permitted to intervene.

After a two-day bench trial, the court found that State Farm was negligent in failing to settle the Judices' claim against the Pariches for the policy limits, plus interest and $12,000 from the Pariches. The court further held that the post-judgment agreement between the Pariches and the Judices constituted neither a valid compromise nor a valid assignment of litigious rights. The compromise was not valid under La. Civ. Code art. 3071, both because there was no mutual consent to adjust differences and because performance of the agreement was not executed in the agreed upon manner (i.e., before a notary). The assignment of litigious rights was invalid because it had been executed before the suit against State Farm was filed. The court denied the Pariches penalties and attorney's fees under La. Rev. Stat. 22:658, finding that State Farm's actions were only negligent rather than arbitrary and capricious. It awarded the Pariches the rendered judgment ($355,700) plus interest from March 24, 1983, less their settlement contribution ($15,000), plus costs, and ordered that they pay this amount to the Judices. State Farm filed a timely notice of appeal, and the Pariches cross-appealed, challenging the reduction of their damages by $15,000 and the failure to award penalties and attorney's fees.

II

State Farm raises two issues. First, it challenges the district court's conclusion that it was negligent in failing to settle the Pariches' claim on March 21, 1986, by refusing to include interest in the settlement. Second, it argues that even if it were negligent, the Pariches' compromise with the Judices fully released the Pariches from liability, so that the Pariches suffered only $15,000 damages from State Farm's actions and thus could assign to the Judices rights to no greater recovery than $15,000. On cross appeal, the Pariches also raise two issues. First, they argue that State Farm's actions in rejecting the offer were arbitrary and capricious, thus entitling them to penalties and attorney's fees. Second, they contend that their judgment should have been reduced by only $12,000, rather than $15,000, as this is all that they would have had to pay had State Farm properly accepted the March 21 settlement offer.

III

A

State Farm attacks the district court's finding that it negligently failed to settle the Judices' suit against the Pariches in two ways. First, it argues that the district court erred in concluding that it was negligent. It contends that its repeated offers to settle the case for the policy limits were all that the law required at the time, and that its ultimate offer of interest and $15,000 from the Pariches demonstrated its due care. Second, it argues that the district court improperly failed to consider its defense that it had been "set up," through collusion between the

Judices and the Pariches. State Farm contends that it was never presented with a good faith offer on which the Judices were prepared to settle.

1

This diversity case is controlled by the substantive law of Louisiana. Louisiana law holds that, although

> an insurer is not required to settle a claim within policy limits under penalty of absolute liability for any excess judgment rendered against the insured . . . [, it] may be liable for an excess judgment against its insured where the insurer's failure to settle within policy limits is found to be *arbitrary* or *in bad faith*.

Cousins v. State Farm Mut. Auto. Ins. Co., 294 So. 2d 272, 275 (La. App. 1st Cir.), *cert. denied*, 296 So. 2d 837 (La. 1974) (emphasis supplied). *Cousins* identifies six factors by which to evaluate the reasonableness of an insurer's failure to settle. These are: 1) the probability of the insured's liability; 2) the adequacy of the insurer's investigation of the claims; 3) the extent of damages recoverable in excess of policy coverage; 4) the extent of the insured's exposure compared to that of the insurer; 5) the rejection of offers in settlement after trial; and 6) the nondisclosure of relevant factors by the insured or insurer. *Id.* The fifth *Cousins* factor is irrelevant here, because no post-trial settlement offers are involved.

The application of these factors led the district court to conclude that State Farm's handling of the Judices' claim was, with one exception, perfectly proper. Very shortly after the Judices' initial demand, all parties realized that the Pariches would probably be held liable for

most of John Judice's injuries (witnesses saw Judice approaching the intersection before Parich entered it from behind a stop sign), and that these damages would far exceed the $25,000 policy limits (State Farm's own damage estimates were $300,000 to $500,000). The first four factors suggest that State Farm should have offered to settle the case, which indeed it did. After preliminary negotiations, State Farm offered to settle the case as early as September 1984, for the balance of its policy limits plus several thousand dollars from the Pariches. State Farm's actions up to March 21, 1986, were thus reasonable.

On March 21, however, the Judices offered to settle for the balance of the policy limits, interest and $12,000 from the Pariches. This offer was the same as the State Farm offer in September 1984, except that it included a request for interest. The question is whether State Farm's rejection of this offer, because of its refusal to pay interest, was arbitrary and capricious.

Although there may have been some doubt before March 18, 1986, whether an insurer in these circumstances was obligated to accept an offer of policy limits plus interest, it became clear at that time. On March 18, the Louisiana Third Circuit Court of Appeals decided the case of *Hodge v. American Fidelity Fire Ins. Co.*, 486 So. 2d 233 (La. App. 3d Cir.), *cert. denied*, 489 So. 2d 917 (La. 1986). In *Hodge*, the court held that where

> there was no substantial issue of liability and it was reasonably certain that a judgment in excess of the policy limits would be rendered against [the insured], [the insurer's] *failure to settle for policy limits plus legal interest was arbitrary and capricious*, in light of the fact that [the insurer]

> would have been cast for judicial interest . . . once judgment was rendered against it.

486 So. 2d at 239 (emphasis added).

Under the facts of this case, which were very similar to those in *Hodge*, the refusal to settle for the policy limits plus interest was arbitrary and capricious. Additionally, we should observe that the evidence showed that when the Judices' attorney made the March 21 offer to State Farm's attorney, he rejected the offer after only checking with a claims supervisor. He did not ask the Pariches to make up the difference, although he knew at the time that they were willing to pay at least $12,000 to settle the case. Neither did he contact the Pariches' attorney. Given the clear duty that the other *Cousins* factors imposed on State Farm to settle the case, we agree with the district court that the insurer's failure to inform the insured of this offer, and of the reason it would be rejected, was negligent.

2

State Farm also argues that the district court erred by refusing to consider its argument that it had been "set-up" by the Pariches and the Judices. It claimed that the Judices and the Pariches engaged in manipulative conduct to expand coverage beyond what the Pariches had purchased from State Farm: Cecilia Bonin, the Judices' attorney, gave Alex Lopresto, State Farm's attorney, an extremely short deadline for accepting the March 21 offer; when Lopresto ultimately acceded to the terms of that offer, less than one week later, Bonin refused to accept it. The Pariches deny that they colluded with the Judices to

"set-up" State Farm, and note that the Judices had requested prejudgment interest twice (on August 5, 1983 and September 6, 1984) before their offer of March 21, 1986.

The district court carefully considered the series of phone calls between Bonin, Lopresto, and State Farm on March 21. It found that Bonin's offer included three elements, two of which Lopresto was authorized to accept. The third element was interest. State Farm argues that the March 21 request for interest cannot have been in good faith, because its offer ten days later of both interest and an extra $3,000 from the Pariches was rejected.[1]

Although a few courts have recognized an insurer's defense of set-up, they have done so where unrealistic offers are presented through "carefully ambiguous demands coupled with sudden-death timetables." *Baton v. Transamerica Ins. Co.*, 584 F.2d 907, 914 (9th Cir. 1978) (victim's offer to settle with two insurers for $110,000 or far lower "total amount of limits of insurance available," conveyed to only one insurer, too ambiguous to be a

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[1] We acknowledge that the circumstances under which the March 21 offer was made are suspect. On that date, the only real issue in the settlement negotiations was interest. All sides had extensively researched an insurer's duty to settle for the policy limits plus interest, and determined that there was no such duty. Although the *Hodge* decision became a matter of public record on March 18, as a practical matter none of the parties could have learned of it until several days thereafter, unless they had some professional connection with the case. All parties disclaim any knowledge of the *Hodge* decision before March 21 and the district court found as a fact that none had prior knowledge. We cannot say that this finding is clearly erroneous.

genuine offer). *Compare McNally v. Nationwide Ins. Co.*, 815 F.2d 254, 262 (3rd Cir. 1987) (distinguishing *Baton* as a case in which plaintiffs "never intended to make an offer capable of being accepted") and *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. Dist. Ct. App. 1975), *cert. denied*, 330 So. 2d 16 (Fla. 1976) (offer to settle less than two months after accident and ten months before trial, which was open for only ten days, "made it virtually impossible to make an intelligent acceptance"). The facts of this case do not establish a legally valid set-up defense.

First, the Judices' demands were never ambiguous. The demands were, in fact, so clear that Lopresto immediately knew which elements he was authorized to accept and which he was not. Second, the offer was genuine. The district court specifically found that "I have no difficulty finding as a fact that the [March 21] offer was legitimate, and had it been accepted it would have been binding." Third, there was evidence that Bonin, the Judices' attorney, believed at the time that $12,000 was all she could realistically expect to get from the Pariches. At the same time, she was sure a court would award her prejudgment interest. Finally, State Farm's subsequent offer of the policy limits, interest and $15,000 from the Pariches was not rejected until a week before trial. By this time, the *Hodge* decision had been a matter of public record for three weeks, and Bonin strongly suspected that State Farm's earlier refusal to settle for the policy limits plus interest was negligent. Armed with the knowledge that liability far beyond the policy limits was almost a foregone conclusion, and that the insureds were effectively judgment proof, Bonin's obligation to her clients precluded

accepting State Farm's latest settlement. Given these circumstances, we cannot say that the district court erred by refusing to consider State Farm's defense of set up.

B

Having concluded that the district court did not err in holding State Farm negligent for failure to settle, we now turn to the issue of the extent of State Farm's liability. We find that State Farm's liability depends upon the nature and validity of the compromise agreement between the Judices and the Pariches.

State Farm argues that even if it were negligent in failing to settle the Judices' claim, the post-judgment negotiations between the Pariches and the Judices resulted in a valid compromise. As a result, State Farm argues, the only right against State Farm that the Pariches could assign the Judices was to recover the "excess amount" that they had to pay to the Judices under the settlement agreement. We agree with State Farm that the parties did enter into a valid and effective compromise agreement that released the Pariches from any further liability. As we set out in more detail below, State Farm's liability is that amount of excess payments that the Pariches suffered as a result of its failure to settle.

Louisiana law provides that the parties to a dispute may adjust their differences by mutual consent and enter into a compromise agreement. La. Civ. Code Ann. art. 3071 states:

> A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their

> differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.
>
> This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

Generally, a transaction or compromise is a contract to settle a lawsuit and therefore must possess the essential elements of any type of contract to be valid. *Horace Mann Ins. Co. v. Casualty Reciprocal Exchange*, 383 So. 2d 1040 (La. App. 1st Cir. 1980). The five specific requirements of a valid compromise under art. 3071 are: (1) a writing; (2) mutual consent to adjust differences; (3) the hope of gain from the agreement; (4) consideration; and (5) performance by the parties in the agreed upon manner. The parties do not dispute the existence of consideration or hope of gain. We will discuss the remaining issues in turn.

1.

Because the compromise agreement between the Judices and Pariches was not made in open court, it must be in writing to be valid. *Jasmin v. Gafney, Inc.*, 357 So. 2d 539 (La. 1978); *Rhodes v. Nalencz*, 545 So. 2d 638, 641 (La. App. 5th Cir. 1989); and *Smith v. Leger*, 439 So. 2d 1203 (La. App. 1st Cir. 1983). This requirement does not mean, however, that everything intended to be compromised must be contained in one document. *Charbonnet v.*

Ochsner, 236 So. 2d 86 (La. App. 4th Cir. 1970), aff'd, 258 La. 507, 246 So. 2d 844 (1971); *Bonnecaze v. Hamrick*, 221 So. 2d 638 (La. App. 4th Cir. 1969), *cert. denied*, 254 La. 461, 223 So. 2d 870 (1969). On the contrary, multiple documents which, when read together, outline the obligations of each party and evidence each party's acquiescence in the agreement may effect a valid compromise agreement. *Felder v. Georgia Pacific Corp.*, 405 So. 2d 521, 523-24 (La. 1981); *Jacobson v. Harris*, 503 So. 2d 540, 542 (La. App. 4th Cir. 1987), *cert. denied*, 503 So. 2d 1019 (La. 1987).

In the instant case, although there was no single writing memorializing the compromise, several documents read together outline the parties' obligations and acquiescence to the agreement. These documents are two letters exchanged by the attorneys for the Pariches and the Judices and a written document purporting to assign the Pariches' rights to the Judices entitled "Assignment of Litigious Right" (hereinafter "Assignment").

The first letter, dated May 7, 1986, was written by the Pariches' original attorney, Mr. DeRouen, and a copy of it was sent to the Judices' attorney. It contained the Pariches' settlement offer to the Judices and expressly set out the terms of the compromise agreement:

> This will confirm our telephone conference of today wherein you (the Pariches) indicate you are agreeable to pay $15,000 and assign any rights you may possess against State Farm, in exchange for a full release from any further liability.

We view this letter as a written offer to compromise, a copy of which was sent to the Judices' attorney, Ms.

Bonin, which was accepted in a letter written by Ms. Bonin and sent to the attorney for the Pariches, dated May 12, 1986. The acceptance letter stated:

> "I am in receipt of and thank you for a copy of your correspondence to the Pariches dated May 7, 1986. I am presently preparing the paper work to accomplish the assignment."

Because this signed letter constituted an acceptance by the Judices, a written compromise agreement was effectuated. Thus, the two letters comprise a written agreement wherein the Judices agreed to release the Pariches from liability for the April 16, 1986 judgment in return for the following three commitments by the Pariches:

(1) Make a $15,000 cash payment on the judgment to the Judices;

(2) Assist and participate in a suit against State Farm for State Farm's failure to settle the Judices' claim against the Pariches; and

(3) Transfer a valid assignment of their rights against State Farm to the Judices.

Independently, the Assignment provides further written evidence that a compromise agreement existed between the parties. The Assignment states that in return for the Pariches' assistance and an assignment of their rights against State Farm the Judices will release them from liability on the earlier judgment. When these three documents are viewed together, we conclude that the parties entered into a compromise agreement that was sufficient to meet the writing requirement of art. 3071. *Felder v. Georgia Pacific Corp., supra.*

2.

The Judices focus their attack on the validity of the compromise agreement by arguing that mutual consent was lacking because there was no "meeting of the minds" concerning the terms of the agreement. The district court concluded that the effect of the agreement, that is, whether it was a total compromise of the lawsuit, could not be deduced from an examination of the written documents only. The district court thus admitted parol evidence on the issue of the intent of the parties, found the testimony conflicting, and concluded that no meeting of the minds occurred. We disagree with the district court's analysis and hold that it erred both in interpreting the documents and in admitting parol evidence.

Appellees correctly point out that to have a valid compromise, there must be a meeting of the minds between the parties as to what they intended when the compromise was reached. *Succession of Magnani*, 450 So. 2d 972 (La. App. 2d Cir. 1984). A compromise agreement must therefore be unambiguous, perfect and complete in itself so that nothing is left for ascertainment by parol proof. *Flowers v. U.S. Fidelity & Guaranty Co.*, 367 So. 2d 107 (La. App. 4th Cir. 1979), *aff'd in part, amended and remanded on other grounds*, 381 So. 2d 378 (La. 1980), *superseded by statute as stated in Odessa House v. Goss*, 453 So. 2d 299 (La. App. 3d Cir. 1984). Finally, we note that a writing will not be considered a compromise if the court must receive parol evidence to reach that conclusion. *Senegal v. Delahoussaye*, 311 So. 2d 58, 61 (La. App. 3d Cir. 1975).

The district court, when determining the intent of the parties, only examined and considered the Assignment, but not the two letters dated May 6 and 12, 1986. Upon this limited and narrow focus, the district court concluded that the terms of the compromise were ambiguous because the Assignment makes no mention of the $15,000 payment to the Judices by the Pariches. Moreover, the district court found that the Assignment was ambiguous concerning the benefits the Pariches were to receive from the Judices under the compromise.

This conclusion is incorrect.[2] The documents that form the basis of the compromise agreement, the two letters, unambiguously release the Pariches from liability for the accident judgment. The May 7, 1986 correspondence, which was accepted and acted upon without objection by the Judices' attorney, states unambiguously that in exchange for the Pariches actions, the Pariches are to receive "a *full release from any further liability.*" (emphasis added) Even more convincing is the language contained in the Assignment – a document that was drawn up by the attorney for Judices, Ms. Bonin. The Assignment states that the Pariches assign their rights to

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[2] Because compromise agreements are contracts, we approach the review of the compromise the same as we would any other contract – on a *de novo* review standard. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236, 95 S. Ct. 926, 934, 43 L. Ed. 2d 148 (1975). The initial question which we review is whether an ambiguity existed in the compromise. This is a question of law. *North Shore Laboratories Corp. v. Cohen*, 721 F.2d 514, 519 (5th Cir. 1983); *Austin v. Decker Coal Co.*, 701 F.2d 420, 425-26 (5th Cir.), *cert. denied* 464 U.S. 938 (1983); *In re Stratford of Texas, Inc.*, 635 F.2d 365, 368 (5th Cir. 1981).

the Judices "in consideration of their *release* from that certain Judgment rendered against them in favor of John Glenn Judice and Audry Judice. . . . " (emphasis added)

Furthermore, we are persuaded by the reasoning in *Felder v. Georgia Pacific Corp.*, 393 So. 2d 394, 395 (La. App. 1st Cir. 1980), *aff'd*, 405 So. 2d (La. 1981), that the prerequisites of a binding agreement are present here. In *Felder*, the compromise agreement stated: "I Walter Felder . . . for the sole consideration of Seven Hundred & no/100 Dollars . . . do hereby release. . . . " The court held that this language was an unambiguous release, complete on its face, and that no parol evidence could be admitted to vary the terms. *Id.* Similarly, in the instant case, we hold that the May 7, 1986 letter and the Assignment unequivocally provided that a release was to be granted by the Judices. Because the term "release" has an unambiguous meaning, we hold that the district court erred in admitting parol evidence on the issue of mutual consent. *Paragon Resources, Inc. v. National Fuel Gas Distribution Corp.*, 695 F.2d 991, 995 (5th Cir. 1983); *Felder v. Georgia Pacific Corp., supra.* Finding that the terms of the compromise agreement are unambiguous and complete, we conclude that mutual consent existed.

3.

The district court also stated that the compromise agreement was defective because the Assignment was not signed by the Judices, which the district court held was further evidence of a lack of a meeting of the minds. We, however, interpret the purpose of the writing requirement in art. 3071 differently. The only purpose of the

writing requirement is to ensure proper proof of extra-judicial agreements; specifically, proof of acquiescence in the agreement. *Bourgeois v. Franklin*, 389 So. 2d 358 (La. 1980). We acknowledge that this statutory requirement generally *implies* that the agreement be signed by both parties. *Felder v. Georgia, supra.*

Nevertheless, we cannot accept the proposition that the absence of the Judices' signatures on the Assignment is fatal to the compromise agreement. First, it is important to note that the Assignment is *not* the written compromise agreement; at best it is only one component of that agreement. As indicated above, the compromise agreement was created by the series of letters dated May 7 and 12, 1986. Indeed, the Assignment was only the attempted implementation of part of the compromise agreement, which was created and finalized by those earlier letters. Therefore, the district court's conclusion was error because any defect in the Assignment did not affect the mutual consent to the underlying compromise agreement.

Second, we also reject the district court's conclusion because the Assignment was clearly accepted by the Judices. Emphasizing that the purpose of the signature requirement is only to evince and assure that both parties have acquiesced to the agreement, *see Bugeois v. Franklin. supra*, we think that the proof of complete acquiescence by the Judices is overwhelming in this case, notwithstanding the lack of the Judices' signatures. First, the Judices accepted a $15,000 cash payment from the Pariches pursuant to the May 7 and 12, 1986 letters. Second, the Judices accepted the assistance of the Pariches in suing State Farm for failure to settle. Third, the Pariches

returned the executed Assignment to the Judices, and, although not signed by the Judices, both parties nevertheless acted upon the document by proceeding to try the case against State Farm. These actions are sufficient to establish that the Judices' acquiesced in the compromise agreement. At the very least, the Judices, having accepted everything requested of the Pariches, are now estopped to claim that they did not consent to the Assignment document on the sole grounds that they did not evidence their consent by signing.

Finally, the Judices' acquiescence to the compromise was independently established when the Assignment was accepted by their attorney, a point that is demonstrated by *Bonnecaze v. Hamrick*, 221 So. 2d 638, 640-41 (La. App. 4th Cir.), *cert. denied*, 254 La. 461, 223 So. 2d 870 (1969). The *Bonnecaze* court addressed an almost identical situation to the case at bar. It held that a compromise agreement, which provided for a complete and unconditional release from all claims and causes of action, became effective when signed by one party and returned to the other party's attorney, notwithstanding the fact that the other party was not aware of and did not sign the compromise agreement. *Id.* The court held that the knowledge of an attorney regarding the facts of a compromise agreement is imputed to the client and found an effective compromise agreement notwithstanding the absence of one party's signature. *Id.* at 641. The facts are even more compelling in the instant case. First, unlike in *Bonnecaze*, the attorney for the Judices actually drew up the Assignment. Second, the Judices, unlike the party in *Bonnecaze*, do not deny knowledge of either the compromise agreement or the Assignment. Thus, both the acceptance of the

Assignment by the Judices' attorney, and the acceptance by the Judices of the consideration called for therein, sufficiently evidenced the existence of a compromise agreement and its execution by both parties. We conclude by noting that our result is entirely consistent with the purpose of art. 3071, which is simply to provide objective proof of the acquiescence of the parties to the compromise agreement.

4.

The Judices further argue that the compromise agreement is invalid because the Pariches did not perform the assignment in the manner specified in the agreement. The district court found that there was no performance in the agreed upon manner because the Assignment was not signed before a notary and two witnesses, and because the document was not validly executed by the Pariches under Louisiana law.

We agree that by its definition, art. 3071 requires that in agreements for the purpose of preventing or ending a lawsuit, the parties must adjust their differences in writing by mutual consent in the manner in which they agreed upon. *Green Giant Co. v. Adcock Distribution Co.*, 420 So. 2d 524, 526 (La. App. 2d Cir. 1982). The question is therefore whether signing the Assignment before a notary, and after State Farm had filed an answer to the petition, were terms of the compromise agreement. We conclude that they were.

The manner in which the Pariches were to perform the assignment of their rights against State Farm was stated in a letter sent by the Judices' attorney to the

Pariches' attorney. That letter, dated January 12, 1987, stated:

> Also included is a copy of the assignment which I prepared to allow the Pariches' to assign their rights to John and Audry Judice *subsequent to an answer being filed on behalf of the defendants.* (Emphasis added)

Additionally, the attorney for the Pariches in the original suit, Mr. DeRouen, testified at the trial against State Farm that he had a telephone conservation with Mr. Guidry, attorney for the Pariches in the suit against State Farm, in which Guidry informed him that validly to assign the Pariches' litigious rights, it was necessary that a suit first be filed and answered before the Pariches executed the assignment.

We find that these instructions constituted the "manner of performance" with respect to assigning the Pariches' rights to the Judices. The letter instructed that the Pariches were not to sign the Assignment until after State Farm had filed an answer to the petition. We also find that the parties agreed that the document was to be signed before a notary.

It is undisputed that the Pariches signed the Assignment before State Farm filed an answer to the Petition. As the district court correctly noted, such an error voids the assignment of a litigious right.[3] When the Pariches

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[3] Under Louisiana law, a right to recover from another, whether it is a debt, an account receivable, a judgment, or a cause of action, may be sold or assigned to a third party. However, a mere dispute may not be. *See generally* La. Civ.

(Continued on following page)

executed the Assignment, no lawsuit had been filed against State Farm for its negligent failure to settle. Indeed, this suit was not filed until ten days *after* the Pariches executed the assignment of litigious rights. Thus, under art. 2635, the Assignment could not have been a valid assignment of a litigious right. We conclude, therefore, that because the Pariches did not perform the Assignment in the manner contemplated by the Judices, the assignment of litigious rights was legally defective.

5.

We must next examine the effect that the defective assignment had on the compromise agreement. At the

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(Continued from previous page)

Code, ch. 12 ("Of the Assignment or Transfer of Credits and Other Incorporeal Rights"). When the right to be assigned is only a cause of action, the law recognizes the incentive to foment litigation and the possibilities of barratry and champerty, and thus places special limitations on the ability to transfer these litigious rights. *Clement v. Sneed Bros.*, 238 La. 614, 116 So. 2d 269 (1959) (purpose of these articles is prevention of unnecessary litigation). A nascent cause of action for a tort that is nothing more than a dispute between two parties is not transferable. *Hawthorne v. Humble Oil & Refining Co.*, 210 So. 2d 110 (La. App. 1st Cir.), *cert. denied*, 252 La. 832, 214 So. 2d 160 (1968). *See U.S. Fidelity & Guaranty Co. v. Richardson*, 486 So. 2d 929 (La. App. 1st Cir. 1986)(under La. Civ. Code art. 2653, where no contestation has developed, the right is not litigious; rather, it is only an incorporeal right more in the nature of a dispute). Once a dispute has developed into an actual lawsuit with a contestation or denial of liability by the defendant, however, it becomes a litigious right. *Id.* Such a litigious right is freely assignable. *See* La. Civ. Code Ann. art. 2652.

outset, we emphasize that the assignment was only part, though a very important part, of the consideration for the compromise agreement. The Pariches were also to tender $15,000 in cash and to assist the Judices in a suit against State Farm. The parties do not deny that the Pariches performed these actions as required and in the manner requested by the compromise agreement. The question presented, therefore, is what effect the failure properly to assign the rights to the State Farm suit had on the entire compromise agreement. To answer this question, we must determine first whether the Pariches' failure to perform this part of the compromise agreement in the manner agreed upon constitutes a material breach; and second, if material, whether the Judices nonetheless acquiesced to or waived the breach when they decided to intervene.

On first impression, the Pariches' failure to perform would appear to be a material breach, and we acknowledge several cases that suggest that a material breach by one party to a compromise agreement abrogates the compromise agreement and reinstates the rights of the other party to sue under the original contract or judgment. *See Midlo & Lehmann v. Katz*, 195 So. 2d 383 (La. App. 4th Cir. 1967), and *Smith Construction Co. v. Brechtel*, 51 So. 2d 643 (La. App. Orl. App. 1951). Both of these cases addressed the effect of a total failure by one of the parties to a compromise agreement to perform any of the terms under the agreement. In *Midlo*, the appellant entirely neglected or refused to pay the amount he owed under the compromise agreement despite the fact that he was a "man of means" and fully capable of discharging this debt. Similarly, in *Brechtel*, the appellee testified that the appellant "never gave me a dime" towards discharging the amount due under the compromise contract.

The important dissimilarities between the facts of the *Midlo* and *Brechtel* cases and the instant case require us to reject the application of *Midlo* and *Brechtel* here. Unlike the situations in *Midlo* and *Brechtel*, the record here shows that the Pariches' actions amounted to substantial compliance with the terms of the compromise agreement. In this respect, our case is virtually identical to *Salling Wiping Cloth Co. v. Sewell, Inc.*, 419 So. 2d 112, 117 (La. App. 2d Cir. 1982), which rejected the application of *Midlo* and *Brechtel*. In *Salling*, the court held that if there is substantial compliance with the terms of the compromise agreement, there is no breach of the agreement because of a failure of perfect performance. *Id.* However, whether there has been substantial compliance with a given compromise agreement depends upon a case-by-case analysis. *Id.*

As in *Salling*, the rule of *Midlo* and *Brechtel* is inapplicable here because an examination of the compromise agreement as a whole, and an evaluation of the ultimate judgment against State Farm, shows that there was substantial compliance notwithstanding the breach in the manner of performance. The agreement between the parties also consisted of the Pariches making a $15,000 payment to the Judices and their cooperating with the Judices in collecting a judgment from State Farm. As counsel for the Judices admitted at trial, at the time the compromise agreement was entered into, the specific manner in which the Pariches were to perform their obligations was not expressly delineated. Nevertheless, it was clearly understood between the parties that, from the Judices' perspective, what was important was only the end result, that being the Judices' obtaining satisfaction

of the April 16, 1986 judgment by means of a suit against State Farm.

Furthermore, the record shows that although the Pariches did not execute the Assignment in accordance with the terms of the assignment, they, nonetheless, proceeded as plaintiffs against State Farm, in full agreement with the Judices. This procedure enabled the Judices to intervene and ultimately to obtain the judgment against State Farm for its negligent failure to settle with the Pariches.

Finally, even if the Assignment had been validly notarized and signed at the proper time, it would have made no difference in the value of the ultimate judgment against State Farm. This result obtains because the total damages suffered by the Pariches on account of State Farm's negligent failure to settle the case, and consequently the total amount they could have assigned in any event, was the "excess" amount they paid to the Judices for their release from the judgment. This amount, which was fixed in the compromise, would not have changed even if the assignment of the litigious right had been effective. The Judices got exactly what they would have received had the Pariches validly assigned their rights to them under the Assignment. In short, the failure to perform the assignment in the manner agreed is not a material breach because it had no material effect on the outcome.[4]

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[4] For the same reasons, we reject the Judices' argument that the failure to properly notarize the Assignment renders the compromise agreement void.

We thus conclude that because the Pariches paid $15,000 to the Judices and fully assisted the Judices at trial, and because any defect in the manner of performance of the Assignment was immaterial to the ultimate recovery, the Pariches substantially performed their obligations under the compromise agreement. As a result of their substantial performance, we hold the compromise agreement valid and effective.[5]

IV

Having concluded that a valid compromise agreement existed between the parties at the time of the suit against State Farm, we at last turn to the issue of what effect the compromise has on State Farm's liability to the Pariches, and hence the Judices. Louisiana law provides that in a suit for failure to settle, an insured is entitled to recover the amount of damages that he sustained as a result of the excess judgment. *Roberie v. Southern Farm*

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[5] Even if the failure to perform in the manner agreed upon were a material breach, the Judices, we think, would likely be estopped to deny the validity of the entire compromise agreement on the basis of the legal defect in the Assignment. The Judices accepted the Assignment, knowing that it had not been executed in the manner requested, at a time when they had a full opportunity to correct its defects. The Judices could have simply sent another copy of the Assignment to the Pariches after State Farm had answered and had the Pariches sign it in front of a notary. The Judices, however, did not avail themselves of that opportunity. Equity weighs against allowing the Judices to set aside the entire compromise agreement, which is favorable to the Pariches, on the basis of a negligent error on the part of the Pariches, where the error was fully known to the Judices who chose to remain silent and accept the Assignment.

Bureau Casualty Ins. Co., 250 La. 105, 194 So. 2d 713 (1967); *Hodges v. Southern Farm Bureau Casualty Ins. Co.*, 411 So. 2d 564, 566 (La. App. 1st Cir. 1982); *Cousins v. State Farm Mut. Ins. Co., supra; Ward v. State Farm Mut. Auto. Ins. Co.*, 539 F.2d 1044, 1049 (5th Cir. 1976); *Bohn v. Sentry Ins. Co.*, 681 F. Supp. 357, 363 (E.D. La. 1988).

As noted above, the Judices granted the Pariches a "full release from further liability" in return for a $15,000 cash payment plus the other non-monetary consideration. This amount represents the Pariches' liability under the compromise agreement. The district court also found that during the initial settlement negotiations surrounding the automobile accident, the Pariches offered to pay the Judices $12,000 of their own money. In other words, if State Farm had agreed to pay the policy limits plus pre-judgment interest at that time and had settled the case, the Pariches personally would have provided $12,000 as part of that settlement. The amount of excess damages the Pariches suffered as a result of State Farm's negligence is, therefore, the difference between the two: $15,000 minus $12,000, or $3,000. This amount was the full extent of the damages the Pariches suffered. This amount, naturally, is therefore the upper limit of State Farm's liability in this suit for its negligent failure to settle. *Roberie, supra*. We conclude that State Farm is liable to the Parichs, and hence the Judices as intervenors, for the excess damages in the amount of $3,000.

V

The Pariches argue that the district court erred by failing to award them penalties and attorney's fees under

La. Rev. Stat. 22:658B(1).[6] They argue that State Farm's actions in refusing to settle the Judices' claim were arbitrary and capricious. The district court found that State Farm's single lapse of care was the failure to contact the Pariches before rejecting the March 21 offer. It concluded that this was negligent, but not arbitrary and capricious. We agree with the district court.

VI

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the Judices in accordance with this opinion.

REVERSED AND REMANDED.

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[6] Section 22:658B(1) provided at the time:

> All insurers issuing any type of contract other than those specified in R.S. 22:656 and 22:657 shall pay the amount of any claim due any insured including any employee under chapter 10 of Title 23 of the Revised Statutes of 1950 within sixty days after receipt of satisfactory proofs of loss from the insured, employee or any party in interest. *Failure to make such payment* within sixty days after receipt of such proofs and demand therefore, *when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty,* in addition to the amount of the loss, of ten percent damages on the total amount of the loss, payable to the insured, or to any of said employees, *together with all reasonable attorney fees* for the prosecution and collection of such loss. . . .

(Emphasis added.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

SAM PARICH, WESLEY PARICH AND AIMEE V. PARICH	CIVIL ACTION NO. 87-0386
VERSUS	SECTION L
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	JUDGE WALTER

JUDGMENT
(Filed Jul 17, 1989)

After trial before the Court commencing on April 11, 1989 and concluding on April 12, 1989, Honorable Donald Lee Walter, District Judge, presiding and after hearing the evidence and arguments of counsel,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs, SAM PARICH, WESLEY PARICH, and AIMEE V. PARICH recover compensatory damages from the defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY in the amount of THREE HUNDRED FIFTY FIVE THOUSAND SEVEN HUNDRED AND NO/100 ($355,700.00) DOLLARS, together with legal interest from March 24, 1983, until paid, less FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, pay all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that intervenors, JOHN GLENN JUDICE and

AUDREY JUDICE, recover from defendants-in-intervention, SAM PARICH, AIMEE V. PARICH and WESLEY PARICH, the sum of THREE HUNDRED FIFTY FIVE THOUSAND SEVEN HUNDRED AND NO/100 ($355,700.00) DOLLARS, together with legal interest from March 24, 1983, until paid, less the amount of their settlement contribution, FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS.

JUDGMENT READ and SIGNED in Alexandria, Louisiana, this 17 day of July, 1989.

/s/ F. A. Little, Jr.
F. A. Little, Jr.
District Judge

APPROVED AS TO FORM:

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Judgment Entered 7-18-89
By sjd
Copy To Guidry
Martin
Ingraham-Dietzen

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

SAM PARICH, ET AL.

versus

STATE FARM MUTUAL AUTO
INSURANCE COMPANY

CIVIL ACTION
NO. 87-0386
JUDGE WALTER

RULING
(Filed Jun 27, 1989)

This suit is brought by plaintiffs, Sam Parich, Wesley Parich, and Aimee V. Parich ("Pariches"), against defendant, State Farm Mutual Automobile Insurance Company ("State Farm"). The trial in this matter was held on April 11-12, 1989. At trial, the plaintiffs alleged that the defendant was in bad faith for its failure to settle a claim made by John and Audrey Judice ("Judices") against plaintiffs and that the defendant acted arbitrarily and capriciously and was in breach of its contractual duty owed to the plaintiffs. Alternatively, plaintiffs claimed that the defendant was negligent in failing to settle the claim made by the Judices for payment of its policy limits plus judicial interest from the date of judicial demand until paid. This Court held that State Farm, through its attorney Alex Lopresto ("Lopresto"), was negligent in its handling of the March 21, 1986, offer made by the Judices and its consequent failure to settle. Now before the Court are two issues which must be decided:

(1) Was there a valid out-of-court compromise reached by the Pariches and the Judices; and

(2) Whether or not an award of penalties and attorney's fees are appropriate in this matter pursuant to L.S.A. R.S. 22:658.

Facts

On May 31, 1982, Wesley Parich, the then minor son of Sam and Aimee Parich was involved in an automobile accident with John Judice in Lafayette, Louisiana. State Farm had issued to Aimee Parich a liability insurance policy covering plaintiffs Aimee Parich, Sam Parich, and Wesley Parich and the 1971 Dodge Challenger which was involved in the accident. The liability insurance policy was in full force and effect at the time of the accident; it had bodily injury liability limits of $25,000.00 per person and $50,000.00 per accident.

Originally, suit was filed on March 24, 1983, by John Judice and Audrey Judice in the 16th Judicial District Court, Parish of Iberia, No. 52363, as a result of the automobile accident. Named defendants were State Farm, Wesley Parich, Aimee Parich, and Sam Parich.[1]

On March 13, 1986, attorney Cecelia Bonin, on behalf of the Judices, offered a final settlement of $310,000.00 to State Farm and the Pariches. Lopresto informed Bonin that the defendants' last settlement offer still stood (State Farm's net policy limits of $24,000.00 plus the insureds' contribution of $12,000.00).[2] On March 21, 1986, Lopresto

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[1] On April 22, 1983, the Judices amended their original petition to add the City of New Iberia and their insurance company as a defendant in the suit.

[2] $1,000.00 had previously been paid by State Farm.

received a call from Bonin stating that settlement could be reached if the interest on the $25,000.00 policy limit from the date of the petition was added by State Farm. After speaking with Clyde Landreth, State Farm's adjuster, but without consulting the insureds *or* their attorney, Lopresto informed Bonin that State Farm would not pay for prejudgment interest. However, Lopresto offered to meet with the insureds to see if they would come up with this amount. Bonin then advised Lopresto that the Judices' settlement offer was withdrawn. At trial, this Court held that Lopresto's conduct in dealing with this offer was negligent.

The state court trial was held April 14 - 16, 1986. The jury rendered its verdict in the case on April 16, 1986. It rendered a verdict in favor of the Judices and against the Pariches and State Farm in the following amounts:

(1) To Audrey Judice, 90% of $51,000.00 plus legal interest thereon from date of judicial demand until paid; and

(2) To John Judice, 90% of $372,000.00 plus legal interest thereon from date of judicial demand until paid.

The jury assigned 10% fault to the City of New Iberia. State Farm paid its policy limits of $24,000.00 plus interest from the date of judicial demand until paid, leaving a balance due from the Pariches of $355,700.00, together with legal interest from March 24, 1983, until paid.

After the judgment was rendered on April 16, 1986, negotiations began between the Judices, the Pariches, and their attorneys. At the time, the Pariches were privately represented by Lynn A. Derouen ("Derouen"). The

Judices requested that the Pariches perform the following actions, to which the Pariches agreed:

(1) Make a $15,000.00 cash payment on the judgment to the Judices;

(2) Assist and participate in a suit against State Farm for State Farm's failure to settle the Judices' claim against the Pariches; and

(3) Transfer a valid "assignment of litigious rights" against State Farm to the Judices.

The effect of this compromise agreement on the Pariches' judgment liability is uncertain. At least, performance would guarantee the Judices' forbearance of the collection of the judgment. At best, the Pariches' performance would release them from any further liability on the judgment.

On July 17, 1987, the Pariches made a $15,000.00 cash payment on the judgment to the Judices and gave sworn statements to Bonin concerning the actions of State Farm and Lopresto. Furthermore, on January 16, 1987, the purported assignment of litigious rights was signed by the Pariches out of the presence of Derouen, the notary of the document. This lawsuit was filed on January 26, 1987.

Law

Louisiana Civil Code Article 3071 provides:

> "A *transaction* or *compromise* is an agreement between two or more persons, who for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

> This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceedings. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form."

The essential elements of an out-of-court compromise are:

(1) Mutual consent to adjust differences in order to put an end to a lawsuit;

(2) Performance in the agreed upon manner;

(3) The hope of gain balanced against the danger of losing; and

(4) A written document.

Specifically at issue in this matter are the presence of mutual consent to put an end to the lawsuit and performance in the agreed upon manner.

Consent

In order to have a valid compromise, there must be a meeting of the minds between the parties as to exactly what they intended when the compromise was reached. *Succession of Magnani*, 450 So.2d 972, 975 (La. App. 2nd Cir. 1984). For a compromise to be valid, it must " . . . be complete in itself and clearly reveal the intent of the parties without the resort to parole evidence." *Maltby v. Gauthier*, 526 So.2d 455, 457 (La. App. 5th Cir. 1988) *citing Senegal v. Delahoussaye*, 311 So.2d 58, 60-61 (La. App. 3rd Cir. 1975). In the case at bar, clearly no meeting of the minds occurred as to the effect of the agreement and

whether it would totally compromise the lawsuit; specifically, the effect of the purported assignment is in question. No effect can be deduced from an examination of the written documents only.[3] Even with the assistance of parole evidence, a determination of the effect the agreement and the assignment has cannot be made. For example, at trial the Judices testified that they did not intend to release the Pariches or State Farm through this agreement. Sam and Aimee Parich testified that they were of the impression that if they were validly able to assign their rights, made the $15,000.00 payment, and agreed to assist the Judices in pursuing State Farm, they understood that they would be released from the judgment. The Pariches' attorney, Derouen, testified that he "hoped" the entire agreement, including a valid assignment would release his clients from further responsibility. Clearly, an unaided examination of the agreement does not reflect the intent of the parties, and particularly, the mutual consent of the parties to end this lawsuit is not evident from a reading of the agreement.

Next, this Court notes that no performance in the agreed upon manner was rendered by the Pariches. The Judices requested that the assignment be in authentic form and executed after an answer was filed by State

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[3] Only the Pariches signed the purported assignment, which stated that they assign their litigious rights to the Judices in consideration for their release of the Judices' judgment against them. The document also states that as further consideration for their release, the Pariches declare that they will assist the Judices in collecting the sums due from State Farm. No mention is made of the $15,000.00 payment made to the Judices by the Pariches in the document.

Farm. Here, the assignment was not signed by the Pariches before a notary and two witnesses. Louisiana Civil Code Article 1833. Derouen, who was also the notary on the document, testified that his secretary had the Pariches sign the document when he was out of the office.

Moreover, in order for a litigious right to be validly assigned, a suit must have been filed and contested before the right can be transferred. La. C.C. Art. 2653. Here, the assignment was signed by the Pariches on January 16, 1987. This suit was not filed until January 26, 1987. No valid assignment of litigious rights was made; the assignment was not in authentic form and was made prematurely.

As no mutual consent to settle the lawsuit is apparent from the compromise agreement and no valid assignment was rendered by the Pariches (thus, no performance in the agreed upon manner occurred), no out-of-court compromise was reached. The Pariches retained the right to bring this lawsuit.

Attorney's Fees

This Court held that State Farm was negligent in its handling of the March 21, 1986, offer made to it by the Judices through their attorney, Bonin. Specifically, this Court ruled that State Farm was negligent, and failed the test of *Cousins v. State Farm Mutual Automobile Insurance Company*, 294 So.2d 272 (La. App. 1st Cir. 1974), *writ denied*, 399 So.2d 602 (La. 1981) and *Hodge v. American Fidelity Fire Insurance Company*, 486 So.2d 233 (La. App. 3d Cir. 1986). This test asks "Did the insurer exercise that

degree of skill, judgment, and consideration for the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit may have been expected to utilize? If it did, there is no problem; it is not liable. If it did not, then a court could easily describe its conduct as being *negligent*, or as not in accordance with the high duty of good faith which it owed to its insured." *Id.* at 236. Although the *Hodge* court found the defendant's conduct to be arbitrary and capricious after an application of this test and thus imposed penalties and attorney's fees under L.S.A. R.S. 22:658,[4] after careful consideration, this Court found that State Farm's conduct did not rise to such a level. The burden of proof was on

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[4] L.S.A. R.S. 22:658 provides in pertinent part: "A. All insurers issuing any type of contract, other than those specified in R.S. 22:656 and R.S. 22:657, shall pay the amount of any claim due any insured, including any employee under Chapter 10 of Title 23 of the Revised Statutes of 1950, within sixty days after receipt of satisfactory proofs of loss from the insured, employee or any party in interest. B.(1) Failure to make such payment within sixty days after receipt of such proofs and demand therefor, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of ten percent damages on the total amount of the loss, payable to the insured, or to any of said employees, together with all reasonable attorney fees for the prosecution and collection of such loss, or in the event a partial payment or tender has been made, ten percent of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney fees for the prosecution and collection of such amount."

the plaintiff to prove that State Farm's actions were arbitrary and capricious, therefore entitling them to attorney's fees. *Thomas v. McInnis Brothers Construction*, 401 So.2d 522 (La. Ct. App. Cir. 1981), *writ denied*, 406 So.2d 608. Plaintiffs failed to carry this burden. State Farm was only negligent; consequently, attorney's fees are not warranted under L.S.A. R.S. 22:658.

Conclusively, this Court finds that no out-of-court compromise agreement was reached between the Pariches and Judices prior to the filing of this lawsuit. The Pariches had the right to bring the suit, and the Judices had the right to intervene. La.C.Civ.P. 1091(1). Attorney's fees are not warranted under La. R.S. 22:658. Therefore, the Pariches are entitled to recover from State Farm the amount of the excess judgment ($355,700.00), together with legal interest from March 24, 1983, until paid, less the amount of their settlement contribution, $15,000.00, plus the costs of these proceedings. Sam, Aimee and Wesley Parich are then ordered to pay John and Audrey Judice this amount with interest from date of judicial demand until paid, plus the costs of these proceedings. IT IS SO ORDERED.

Judgment approved as to form in accordance with this opinion will be signed upon presentation.

THUS DONE AND SIGNED at Monroe, Louisiana, this 27 day of June, 1989.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE 6/27/89
BY sjd
TO Guidry III
Martin
Dietzen

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

PARICH, SAM, ET AL	*	
	*	
VERSUS	*	NO. 87-0386
STATE FARM INSURANCE	*	

APRIL 12, 1989

[p.2] (PRIOR PROCEEDINGS DELETED FROM THIS TRANSCRIPT.)

THE COURT: I think this is one of those times when I'm going to start off with what I appreciate to be the law. This Eire Bond Court is to follow the law of Louisiana, and to reach the same result that a court across the street would reach. In this case that's the what, 15th Judicial District Court?

MR. MARTIN: The one across the street is, but it would have been the 16th in this case.

THE COURT: 16 Judicial District Court, all part of the Third Circuit Court of Appeals for the State of Louisiana. It would seem to me that Hodge is more instructive than it is a matter that I must follow. It doesn't really seem to add anything to the cousins test in the sense that it forges new law. It would seem to me that the law has been since I was an insurance defense lawyer back in the '60's, always been the load star of the insurer's obligation is to protect the insured within the limits of the policy.

And that, to me, is the test that the Louisiana Law has always applied. Do you agree or not agree with that Mr. Guidry?

MR.GUIDRY: I agree with that, depending on what you say is within the terms of the policy.

THE COURT: Okay. And do you agree with what I have just said, Mr. Martin?

[p.3] MR. MARTIN: Yes, sir.

THE COURT: All right. This case would be easy, I think, had Ms. Bonin said I want twenty-five thousand dollars and one cent, plus interest. I think the law of Louisiana is clear that State Farm could have said not a penny. If it has to be on State Farm's check, not a penny. Because that would clearly be outside the limits and parameters of the policy of insurance written here. However, let me quote from Hodge versus American Fidelity Tire Insurance Company, 486 So. 2d 233 at page 236. In his, Judge Aaron's, written reasons for judgment the Trial Judge thoroughly and accurately set forth the law relative to the issue presented by the instant case. We therefore adopt his discussion as follows. The jurisprudence is clear that a liability insurer is not required to settle a claim against its insured, even within the policy limits, under the penalty of an absolute liability for excess judgment which may be rendered against its insured. However, the insurer may be liable to its insured for the judgement in excess of policy limits for which the insured is cast where the insurer's failure to accept the settlement offer is not in good faith or is arbitrary or capricious under the circumstances, and I emphasize under the circumstances, citations. The insurer has a duty to protect its

insured, citing Domay. Louisiana jurisprudence establishes that a [p.4] duty is placed upon the insurer to consider the interest of the insured as paramount when an offer to settle is made. The insurer has a duty to act in good faith and to deal fairly when handling and settling claims in order to protect the insured from exposure to excess liability. It gives the test of cousins. The court went on to say: did the insurer exercise that degree of skill, judgment and consideration for the welfare of the insured which it, as a skilled, professional defender or lawsuits, having sole charge of the investigation, settlement and trial of the suit may have been expected to utilize. If it did, there is no problem. It's not liable. If it did not, then the court could easily describe its conduct as being negligent or not in accordance with the high duty of good faith which it owed to its insured. That, I think, sums up the law to be applied to this case. I have absolutely no problem with all of State Farm's actions except one. I think they investigated it properly. I think they evaluated it properly. I think they looked at it properly. I think they came to the correct conclusion that twenty-five thousand was never going to be enough. I think they were proper in rejecting every claim. I think the attorney for State Farm behaved, up until through March 20th. Exactly has [sic] we should expect our members of the bar to behave. Although I think that the problems of the 21st had their genesis in something that happened [p.5] earlier. And that is the potential for conflict to me just stood out, that everybody was in agreement that it was going to be more than twenty-five thousand dollars, that the insured was, if this thing went, was going to get stuck. And the letter went out. And they hired A, the Judices hired a lawyer,

but somehow. Excuse me, the Judices. The Pariches hired a lawyer, but somehow that lawyer didn't get consulted as much as he should have been consulted, and certainly he wasn't consulted on the 21st. Now, there is no sense in this court speculating on what might have happened if counsel had consulted all the way through and these offers had been made. We turn to the offer of March 21st. I have no difficulty finding as a fact that the offer was legitimate, and had it been accepted it would have been binding. I will at a later time address the question of motivations. Let's put that to the side for a moment, because frankly, it is this Court's opinion that as a matter of law it doesn't make any difference what her motivations were in making the offer. Anybody wants to comment as I guess along feel free to raise their hand. On Friday, March 21, 1986, Ms. Bonin negotiated with the city of New Iberia and cut a deal. At sometime around noon she tried to call Mr. Lopresto to make an offer. Apparently she could not get him for sometime. Sometime around noon she did get him, and she made the offer. You and your client, both insurer and [p.6] insured, may walk out of this upon the payment, upon three things being done. The insured pay twelve thousand dollars. Mr. Lopresto had that authority in hand and Mr. Parich testified that he had the ability to pay that twelve thousand dollars. Okay. The second thing she wanted was twenty-five thousand dollars from State Farm; had that authority. And the third thing she wanted was interest to date on the twenty-five thousand dollars from State Farm. To put the best face on it, perhaps move by compassion, whatever. Perhaps accepting Mr. Lopresto's word as final that twelve thousand dollars was it.

Regardless, Ms. Bonin made the offer, I will take the twelve, I will take the twenty-five, but I want that interest, roughly eight thousand dollars, in interest. And she said that I want it quick. Sometime in a period of time between fifteen minutes and a couple of hours Mr. Lopresto called State Farm, and only State Farm, Mr. Landreth, and was told: We don't pay prejudgment interest. Tell him no. Without consulting any further Mr. Lopresto called Ms. Bonin and said: We don't pay prejudgment interest. Let's assume that Mr. Lopresto then said: Wait a minute. Let's work this out. We are only eight thousand dollars apart. Give me a chance. And that Ms. Bonin then said: If you think you are going to get the eight thousand dollars from those insured and then pay me, you are wrong. That isn't what I have offered and that [p.7] offer is now withdrawn. I don't think she had to withdraw it. I think he rejected it. That ended it. What would have happened had Mr. Lopresto said: I can't give it to you right now. I don't know. Let me stir around. Let me see if we can brainstorm and come up with a way of paying you on State Farm's check. What if he had had the brainstorm then and said: Wait a minute. It's a done deal but here is what I have got to talk my client into, I have got to talk my client into confessing judgment, and then we can pay. Unfortunately, none of that happened. Instead, there was a rejection. Unfortunate, I think, for State Farm. Had he said that, had he asked for more time, would State Farm have been arbitrary, capricious or negligent? Would they have not had the best interest of their client at heart? I think probably not. I think probably they wouldn't get called for it. I think they would not be negligent, they would not be arbitrary and capricious.

That isn't what they did. What they did was they rejected. They didn't consult with their insured, they didn't consult with their insured's lawyer, they made no effort that I heard to come up with a way to do what was asked. I think they were negligent. And I think they failed the test, both of cousins and of Hodge. And it was all done in that fifteen minutes to an hour, two hours. What happened next is interesting, and it may have some bearing on this case. I will ask for briefs on this. An [p.8] offer is made by Mr. Lopresto, right in line with the previous offer by Ms. Bonin, and Ms. Bonin said too late, that's gone, no, we will go. I will take my chances, or we will take our chances in trial. And she goes and she gets a judgment for a lot of money. I can't help but comment on Ms. Decourt, Young and inexperienced, but to me she knew exactly how to handle herself. She went in there and the minute she got popped with a copy of Hodge, she said at her first opportunity, according to her testimony, she went to the Pariches and said let me tell you about this. You might want to look at this. And this is my personal opinion, but you better go see another lawyer because you may have an action against State Farm. I like that. I think she performed well, and I would think I would be remiss in not commenting on it. What's the result of the assignment? I have no evidence on what Ms. Bonin thought or whether she ever considered what would happen if she lost this case. Mr. Derouen thought that if she lost the case, that was it, that the settlement, that there had been a settlement. And he took his chances not signing one as he explained. He wasn't in the position to dictate terms. If anybody was dictating terms, Ms. Bonin and her clients were dictating terms. They were the

four hundred thousand dollar plus gorilla in this story. There is no doubt in my mind that here was what Ms. Bonin thought, that what she was going to [p.9] get was a new policy of insurance by State Farm and that State Farm was going to pay every dime of it, less and except twelve thousand dollars, that she was going to get all the rest of it.

MR. MARTIN: At that point?

THE COURT: Ultimately, after this lawsuit, or as a settlement during the couse of it.

MR. MARTIN: Okay.

THE COURT: That she never contemplated getting less, getting zero. That she always contemplated getting some more, in which case she and her clients were willing to release the Pariches. Based on the evidence that I have heard, that's what I find. What is the result of that? I want that briefed. I don't know what the result of that is. I suspect I know but I want that briefed. Do you understand, Mr. Martin? You look puzzled.

MR. MARTIN: The affect of assignment based upon your conclusion that she concluded that she could not lose this lawsuit?

THE COURT: There is no evidence that she ever contemplated that.

MR. MARTIN: Yes, sir.

THE COURT: Is there any evidence? We know what the Pariches expected, and the Parich's Lawyers, that once they did what they did, and by the way for the purpose of [p.10] this case I will find that it was to be

confected after, regardless of the date on the document, that it was to be, that the Judices were not to, this was not final except. Come in, please, Ms. Bonin. There is no evidence that the Judices had the understanding that it would be all over with until the assignment had been legally confected and given and accepted. So that acceptance, if any occurred after the petition, this is State Court, right? A petition and answer. Except for the question of motivation, is there anything else I need to address?

MS. INGRAHAM-DIETZER: Your Honor.

THE COURT: Yes, Ma'am.

MS. INGRAHAM-DIETZER: I'm still not clear on what you asked to be briefed.

THE COURT: I want to know the affect of facts surrounding the assignment that I just found.

MR. MARTIN: The events after May 2, I think is what we are talking about.

THE COURT: Yes. After the Judgment.

MS. INGRAHAM-DIETZER: Is the question was there a valid assignment, is that, am I?

THE COURT: It might be that but it might be broader that that.

MS. INGRAHAM-DIETZER: Okay. That's where I am having a little difficulty.

[p.11] THE COURT: Here is what I am saying happened, that the Pariches and their attorney, Mr. Derouen, thought that if we give then an assignment of our cause

of action and fifteen thousand dollars that is the last we will ever hear of it. That was their intent. That was the cause of what they did. I find that as a fact, Okay?

MS. INGRAHAM-DIETZER: Okay.

THE COURT: There is no evidence that Ms. Bonin did or did not contemplate ever losing this case, so I just don't know the answer to that question. But I do find that it was the intent of Ms. Bonin and her clients, the Judices, that they were not going to pursue them the Pariches, if, one, they got the fifteen thousand dollars; two, they got an assignment, and they were able to enforce that assignment for whatever that was worth, either in settlement or in ultimate judgment value.

MS. INGRAHAM-DIETZER: So the question, if I can phrase it, is what is the affect of that assignment and their participation in this trial should they lose?

THE COURT: No. What is the ultimate affect of those facts? Is there an assignment? What is it worth? For instance, one of the things we were kicking around was what is the value of that? Could it be argued that the value of that assignment was how much blood was in the turnip, or was it for the full amount of the exposure?

[p.12] MS. INGRAHAM-DIETZER: Or was there a no assignment at all?

THE COURT: Or was there no assignment at all. Because what happened was it wasn't notarized in front of the, I mean it wasn't sworn to in front of the notary. It was done at a different time. I find that. I find that they probably, that they executed it on, what is that, the 6th or 16th? I can't remember right now.

MR. GUIDRY: 16.

THE COURT: That the Pariches signed it on the 16th, but that it certainly wasn't accepted by the Bonins and the Judices until, it was not their intent to accept it until after petition filed in state court and answer done, and that there wouldn't be any acceptance until after those two events had occurred. But that it was accepted after those two events occurred.

MS. INGRAHAM-DIETZER: Well it's still a question of fact as to whether or not it's been accepted and to whether or not the.

THE COURT: No, I think there is sufficient proof. Tell me why you think there isn't sufficient proof that it was in fact accepted and it was accepted post the filling of the answer in this lawsuit.

MS. INGRAHAM-DIETZER: Well, it was my appreciation that the offer in the particular context was [p.13] the letter of Mr. Guidry enclosing the complaint and in closing the proposed assignment that was actually signed by the Pariches. It's my appreciation that an acceptance has to be in the same form as what was offered, and since that paper was signed.

THE COURT: Fine. Brief that.

MS. INGRAHAM-DIETZER: Okay.

THE COURT: Brief that.

MS. INGRAHAM-DIETZER: Since that paper was signed before the lawsuit was filed, that paper probably does not act as assignment.

THE COURT: Great. Brief that issue too.

MS. INGRAHAM-DIETZER: Okay. Then in addition, if you consider this to be a release or a compromise of a lawsuit, under the code, No, Civil Code, it has to be, it's my appreciation it has to be a single document and it has to be in writing evidencing the intent of both parties. And in this case that didn't occur.

THE COURT: Great. So you can go ahead and brief whether it was a release or not, and what would be the affect of if it was a release or if it was not.

MS. INGRAHAM-DIETZER: That's correct. If you and I are on the same wavelength, I have no problem providing you with that. I have no problem providing you with anything that you request. I just want to make sure that I [p.14] am.

THE COURT: What "if" do you think we don't understand?

MS. INGRAHAM-DIETZER: What I didn't understand was your statement about the lack of evidence as to the intent of Ms. Bonin.

THE COURT: Excuse Me. I don't know whether Ms. Bonin did or did not ever contemplated losing this case. In other words, one of the questions that got asked Mr. Derouen was what happened, I think I asked it. What would happen if this, if State Farm wins this case?

MS. INGRAHAM-DIETZER: Right. You did ask that.

THE COURT: And he said: Well, I think that's just tough nougies. My clients are home free. That's what he

thought, and that's what he was, that's what he was tendering.

MS. INGRAHAM-DIETZER: I think that's what he hoped. I think that's what he said he hoped.

THE COURT: I have no trouble finding that both, excuse me, Mr. Parich thinks that regardless of the outcome of this suit, he is finished. And when he signed that he thought that.

MS. INGRAHAM-DIETZER: Mr. Derouen admitted there was the risk that that wasn't finished.

THE COURT: And where does that leave us?

[p.15] MS. INGRAHAM-DIETZER: I'm not sure.

THE COURT: I'm not either.

MS. INGRAHAM-DIETZER: I need to know.

MR. MARTIN: We can file a brief on that.

THE COURT: That's what I want to know. Where does that leave us? All right. Except for motivation in making the offer on March 21, is there anything else that I haven't addressed?

MR. GUIDRY: There was something I thought of a minute ago, but it took so long I forgot it. If it comes to me I'll bring it up. I know what it is now, Judge. The other think you said, what things indicate that this assignment was not accepted later. And I think the other thing that indicates that is that at no time where the Judices substituted as a Party Plaintiffs, and in fact Mr. Parich up to today continued and has pursued this case and in fact the Judices intervened as opposed to.

THE COURT: I guess we can leave it this way. What I want y'all to brief is the affect of the post judgment actions by the parties. You know, by the parties in this case, I mean the Judices, the Pariches, and the attorneys for each of them. All right, anything else except the March 21, motivation for the March 21 offer?

MR. MARTIN: Are we going to receive a copy of this?

[p.16] THE COURT: He is taking it all down.

MR. MARTIN: I understand. Do we have to make our point now or forever hold our peace, or can we come back later on if there is something you forgot as a find of fact?

THE COURT: Always, if there is something that I need to do. But I would appreciate it while, the fresher it is in my mind.

MR. MARTIN: I understand, your honor.

THE COURT: The fact finding that I didn't do, for goodness sakes, let me know.

MR. MARTIN: Sure.

MR. GUIDRY: Does the court find that it was the entire agreement between the parties that they do those three things, that is that they pay the fifteen thousand dollars, that they assist in this case, and that they also give a valid assignment of their rights to State Farm? Does the court find that was the agreement which was entered into between the parties?

THE COURT: Does this help you any? I find that the cause by, on behalf of the Pariches, was to get out of

here without paying anything more than fifteen thousand dollars. Okay? And the cause on the part of the Judices was to get more than they could get out of the Pariches from State Farm. That it would be some sum between what they had [p.17] gotten on, and the maximum under the judgment that they could get from the Pariches if the Pariches were rich as Croesus. Does that help any?

MR. GUIDRY: It helps somewhat. But I think, to me, all of the testimony from Mr. Derouen, from the Pariches and from the Judices and from Ms. Boinin [sic] was that the entirety of the agreement hinged upon all three of the things being done and that, you know, even Mr. Derouen said more than one time here today that it was pay the fifteen thousand and also to give a valid assignment. And I think if the court finds that I think it can made a very big difference in the outcome of this case.

THE COURT: Fling that at me one more time, Mr. Guidry.

MR. GUIDRY: Mr. Derouen and Ms. Bonin and the Pariches and everyone that testified as to what transactions took place all testified that the agreement contained three things. It wasn't an agreement to pay fifteen thousand dollars for this, you know, from one particular.

THE COURT: Particular things.

MR. GUIDRY: It was all three things.

THE COURT: Full full cooperation, fifteen thousand dollars and assignment of whatever rights.

MR. GUIDRY: That's correct. And also that it was Mr. Derouen's understanding that that assignment was suppose [p.18] to be done in a particular way, and that is

that it was suppose to be done after the petition was filed and answer filed.

THE COURT: I don't think that Mr. Martin would disagree with that fact.

MR. GUIDRY: If the court finds that, then I have no problem.

THE COURT: Anything else?

MR. GUIDRY: One other thing, I don't know whether or not this is encompassed in this or not, is the petition which has been filed by the Pariches also entitles them in addition to the damages that they recover on behalf of the Judices or that are covered by the Judices' intervention, but the penalties and attorney's fees.

THE COURT: How am I suppose to assess that? You have rested, and what do I do? There is no evidence.

MR. GUIDRY: There is a statute, certainly there is a statute and there is in my.

THE COURT: How do I know how much that is?

MR. GUIDRY: Oh, No, I didn't, I just didn't know whether or not you were putting that aside or not. I know it's conditioned upon what you find.

THE COURT: Suppose I find they are entitled to it, what do I give you?

MR. GUIDRY: Suppose that you find what?

[p.19] THE COURT: That you are entitled to Attorney's fees, what do I give you?

MR. GUIDRY: Well, I think that determination would have to be made at a later date.

THE COURT: You better brief that. Everybody has rested.

MR. GUIDRY: Well the, Your Honor, the Attorney's fees under the, in every case, I have ever been involved in, and I have tried one with you before on a, particularly on Attorney's fees issue that went up to the United States Supreme Court, and subsequent to the judgment we had a special hearing where we submitted evidence of the Attorney's fees. Very difficult to put the Attorney's fees into the record at this point when I hadn't even written the brief that I'm going to have to write.

THE COURT: I don't know. I didn't think about the Attorney's fees when you rested. I just thought well maybe he is not after the Attorney's fees any more. Where are we? There is something else for you to brief, how do I give you Attorney's fees to which you are entitled.

MR. GUIDRY: I would request that the court leave the record open so that I can present evidence of my Attorney's fees?

THE COURT: Mr. Martin, is there an objection?

MR. MARTIN: What evidence would he present, I [p.20] don't know.

THE COURT: He wants to reopen the record and hold it so that he can put on evidence of Attorney's fees.

MR. MARTIN: I would object to that, your Honor. I think the case is concluded.

THE COURT: Brief that. Anything else? Okay, I am going to clear the courtroom of everybody but the Attorneys, and you, Ms. Bonin. I want you to stay.

(Further proceedings deleted from this Transcript.)

[p.21] CERTIFICATE

I, RICHARD D. WILLIAMS, Official Reporter, United States District Court, Western District of Louisiana, do hereby certify that the above and foregoing typewritten matter constitute a true and correct copy of the proceedings had at the time and place as hereinbefore set forth on page one hereof.

I certify that the transcript fees and format comply with those prescribed by the court and the judicial conference of the United States.

/s/ Richard D. Williams — 4-19-89
RICHARD D. WILLIAMS — DATE